No. 3518

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE WEST SIDE IRRIGATING COMPANY,
a Corporation,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

CARROLL B. GRAVES, Central Building, Seattle, Washington,

HARTMAN & HARTMAN, Burk Building, Seattle, Washington,

Attorneys for Appellant.

FRANCIS A. GARRECHT, Federal Building, Spokane, Washington,

E. W. BARR, Yakima, Wash.,

Attorneys for Appellees. [2*]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Leave to File Complaint to Vacate Judgment.

To the Honorable the Judge of said Court:

Comes now your petitioner, The West Side Irrigating Company, a corporation of the State of Washington, and respectfully shows unto the Court as follows, to wit:

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*Page-number appearing at foot of page of original certified Transcript of Record.

I.

That the said petitioner is a corporation duly formed and existing under and by virtue of the laws of Washington with its principal place of business at Ellensburg in said State, and that it was incorporated for the purpose of appropriating and using water for irrigation purposes taken from the Yakima River and distributing the same to its stockholders, and has been in such business uninterruptedly since on or about the first day of July, 1890. That on the fifteenth day of October, 1917, judgment of the United States District Court for the Eastern District of Washington, Southern Division, holding terms at Yakima, in favor of the United States of America as plaintiff and against the West Side Irrigating Company as defendant, was affirmed on an appeal from the above-entitled court, all as recorded in Volume 246 of Federal Reporter at page 212, and [3] upon a *remittitur* from said United States Circuit Court of Appeals being received at Yakima, Washington, the judgment of the lower court entered on the nineteenth day of February, 1916, was thereby affirmed, but no action has been taken thereon since the entry of judgment.

II.

That at the time of the incorporation of said petitioner in 1889, it appropriated water for irrigating purposes from the Yakima River in the County of Kittitas, in said State of Washington, in the amount of four thousand miner's inches and commenced the use thereof during the summer of 1890, and since said date and up to the present time has been in uninterrupted and constant use of the water so appro-

priated, taking all thereof that it required for the purposes of its business and in supplying its stockholders up to the amount of four thousand miner's inches, and at no time since said date and up to this time has such right of user been interfered with by any person or persons whomsoever and has so adversely used the same up to and including the present date.

III.

That on or about the twenty-first day of October, 1905, the said respondent sent to the petitioner and its officers a duly authorized agent and employee, one T. H. Noble, who solicited the said petitioner to enter into an agreement in writing by which the water by it appropriated should be measured by cubic feet per second of flow instead of being determined by *cubic feet per second of flow instead of being determined by* miner's inches as the same was originally taken and the usual way of measurement in the neighborhood, and after negotiating with the said Noble and taking his statements and representations, he being a hydraulic engineer of skill and attainment, the said [4] petitioner was induced to and did enter into an agreement by which the water to be used in the conduct of its business should be eighty cubic feet per second, and the contract was so executed, and at the time the said petitioner and its officers believed, and were led to that conclusion by the statements made by the agent of the United States, that when they received eighty cubic feet per second of water it was equivalent to four thousand miner's inches as by the petitioner appropri-

ated, and the mistake and error was not discovered until the summer of 1908 when the said Noble, then being in the employ of the State of Washington in doing hydraulic and irrigation work, came again to the petitioner and its officers, when, having discovered the mistake about that time, the said petitioner informed the said Noble of the mistake made and protested against being bound by the agreement as made, for the reason that a mistake had been made and the petitioner had been deprived of a valuable right and of sufficient water to supply its stockholders, as the amount appropriated is necessary therefor in order to produce the crops of the stockholders covering about seven thousand acres and in grass, grains and other crops such as are grown by irrigation in said district, and all of the land in a high state of cultivation.

IV.

That the petitioner discovered when the protest was made on the date aforesaid and about that time that four thousand miner's inches of water flow as determined by the custom and the decision of the Honorable Superior Court in and for the said County of Kittitas, where the rule was announced and [5] followed in the said district, would require a much larger amount than eighty cubic feet per second and not sufficient to protect and mature the crops growing in the district aforesaid.

V.

That the petitioner, after having protested, believed that its rights were fully protected and that it would not be disturbed in any way, and that it

would be entitled and permitted peaceably to use the amount of water by it appropriated and that the respondent would be duly informed by the said Noble, and the said petitioner believed and understood that when it gave the notice to the said Noble, who was in charge of the irrigation matters upon the Yakima River and the chief therein, nothing further would be required of it in order to protect its rights, and that when said action was determined by this Court it was urged by the learned counsel for the respondent that because the protest against the effectiveness of the agreement aforesaid limiting the amount of water had not been communicated to the respondent, then and thereupon because of remaining silent, the said protest became of no effect, and the said Circuit Court of Appeals stated in its opinion as follows:

> "The stockholders gave no notice to any officer of the United States that they repudiated the contract, but on the contrary by their silence they ratified the same";

which conclusion and the argument producing the same caused the said case to be determined adversely to this petitioner, which petitioner alleges would not have occurred if all of the facts had been presented which were not then known to this petitioner.

VI.

That after said cause brought by the United States as aforesaid had been appealed to the United States Circuit Court [6] of Appeals and for the first time, and information which it could not have before obtained, the said petitioner learned that immediately after the protest was lodged with the said Noble

as aforesaid, he, the said Noble, then and there communicated the fact of said protest to the officer of the United States in charge of all of its irrigation affairs in the entire Yakima Valley in said State of Washington, which office was at Yakima, in said district, and informed the said agent in charge of the same of the alleged mistake and of the intention of the said petitioner and its stockholders to refuse to stand and abide by said agreement because of mistake and misunderstanding, the said discovery, being on or about the 18th day of June, 1918, and that at the time of the trial of said cause the said agent in chief of said reclamation service in said district was in court and upon the stand as a witness, but did not disclose the fact of notice, but kept the same from the Court and this petitioner, and had he disclosed the fact the action would have been determined differently as shown by the decision of the United States Circuit Court of Appeals.

VII.

That the said petitioner was diligent in the preparation of its cause of action and that it believed it had protected its rights and was taken completely by surprise when the respondent denied any notice of such protest and then believed that no such notice had been received and only by mere accident discovered it later on, and that if a new trial is granted it will be able to produce the testimony to fully convince the Court that it should prevail.

VIII.

That the said petitioner has been in the open, notorious [7] and continuous use of all the water

appropriated by it when needed without let, hinddrance or protest from any person or persons whomsoever and by adverse user is entitled to have its rights adjudicated by which it shall be entitled in the future to use in the past the entire four thousand miner's inches of water when the same is necessary and required, and that it will be able to prove all of its rights as herein claimed and set forth and for which it asks a new trial, by T. A. Noble, J. H. Prater, F. A. Strande, Mitchell Stevens and John Burch, C. T. Kenneth and W. A. Stevens, who will be in court as witnesses when said action is heard again in the United States District Court for the Eastern District of Washington, Southern Division. That by reason of the judgment and decree made as aforesaid if the same is put into effect (altho it has never been enforced but may be at any time), this petitioner and its stockholders have been greatly damaged and will be irreparably damaged if the decree is allowed to be enforced.

IX.

That the said respondent is the user and seller of water taken from the Yakima River and its tributaries, not in its sovereign capacity but in a private capacity in a business way, the same as individuals or local corporations of the State use water for irrigating purposes, having obtained the right, as individuals and corporations do and must, from the State of Washington for engaging in said business, and has no rights or more rights than those enjoyed and taken under the laws of the State of Washington,

the said Yakima River and its tributaries being purely intrastate streams. [8]

X.

That upon petition duly presented to the United States Circuit Court of Appeals for the Ninth Circuit, where said judgment was affirmed on appeal as hereinabove mentioned, your petitioner was, by order of said Court entered on the 3d day of September, 1919, granted permission to present and file within petition in the above-entitled court for leave to have said judgment reviewed and the cause reheard in said court and 10 days allowed within which to file said petition herein, and the same is presented and filed herewith within the time as specified.

WHEREFORE, your petitioner prays for decree of this Court granting leave to file its bill of complaint herein to obtain a review and a rehearing of the former judgment, upon the ground of newly discovered evidence and adverse user, and for such order and decree as shall be proper and meet in the premises.

CARROLL B. GRAVES,
HARTMAN & HARTMAN,
Attorneys for Petitioner.

State of Washington,
County of King,—ss.

Mitchell Stevens, being first duly sworn, on oath says: He is vice-president of the West Side Irrigating Company, the aforesaid petitioner, and makes this verification for and on behalf of said corporation. That he has read the foregoing petition,

knows the contents thereof, and that the same is true as he verily believes.

MITCHELL STEVENS.

Subscribed and sworn to before me this 3d day of September, 1919.

HAROLD H. HARTMAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in the U. S. District Court, Eastern District of Washington, September 5, 1919. Wm. H. Hare. By C. Roy King, Deputy. [9]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Order Granting Leave to File Bill of Complaint to Vacate Judgment.

This cause coming on to be heard *ex parte* this day upon presentation of the petition for relief to file complaint to vacate judgment, the said petitioner appearing by its attorneys upon the petition and the Court, being fully advised in the premises, finds that

the United States Circuit Court of Appeals for the Ninth Circuit on the 3d day of September, 1919, granted leave to present this petition to the undersigned Judge and, after consideration,—

IT IS ORDERED that the petition aforesaid be received and the same, with this order and other papers, shall be filed with the clerk of the court at Yakima, Washington, and the petitioner is hereby granted and given authority to file its bill of complaint for a new trial in this cause with the clerk aforesaid and, upon filing the same, the clerk shall issue the usual process and deliver the same for service upon the respondent aforesaid, to be served in the usual and ordinary way with the usual time as prescribed by the rules of this court for the respondent named aforesaid to be and appear in and defend said cause according to the rules of this court.

Done and signed this 3d day of September, 1919.

FRANK H. RUDKIN,
Judge of said District Court.

Filed in the U. S. District Court, Eastern District of Washington. Sept. 5, 1919. Wm. H. Hare, Clerk. By C. Roy King, Deputy. [10]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Motion for Leave to Amend Bill of Complaint.

Now comes the plaintiff and moves the Court for leave to file its second amended bill of complaint, herewith presented.

Dated this 8th day of April, A. D. 1920.

HARTMAN & HARTMAN,
CARROLL B. GRAVES,
Attorneys for Plaintiff,

Filed in the U. S. District Court, Eastern District of Washington, April 10, 1920. W. H. Hare, Clerk. [11]

In the District Court of the United States, for the Eastern Division of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Stipulation in re Amended Bill of Complaint.

IT IS STIPULATED AND AGREED, between the plaintiff, by its attorneys, Carroll B. Graves and Hartman & Hartman, and the defendant by its attorney, Francis A. Garrecht, that the plaintiff may file an amended bill of complaint in this action, to stand in the place of the one already filed, and that the defendant shall be given twenty (20) days in which to answer the same, and a further time, if a request is so made by the defendant in writing to the attorneys for plaintiff.

Dated, Sept. 27th, 1919.

CARROLL B. GRAVES,
HARTMAN & HARTMAN,
Attorneys for Plaintiff,
FRANCIS A. GARRECHT,

Filed March 23, 1920. W. H. Hare, Clerk. [12]

In the District Court of the United States, for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Allowing Filing of Second Amended Complaint.

Upon the application of plaintiff therefor, it is

ORDERED: That the plaintiff may file its second amended bill of complaint, which said amended bill of complaint has been served upon the attorneys for the defendant and tendered for filing with the plaintiff's application.

Dated this 10th day of April, A. D. 1920.

FRANK H. RUDKIN,

Judge. [13]

In the District Court of the United States, for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Second Amended Bill of Complaint.

Comes now the said plaintiff above named and by leave of Court first had and obtained, files this its amended bill in equity in the nature of a bill or review of the judgment hereinafter referred to, and for cause of action states as follows:

I.

That the said plaintiff is a corporation duly formed and existing under and by virtue of the laws of Washington, with its principal place of business at Ellensburg in said State, and that it was incorporated for the purpose of appropriating and using water for irrigation purposes taken from the Yakima River, and distributing the same to its stockholders, and has been in such business uninterruptedly since on or about the 1st day of July, 1890, and that on the 15th day of October, 1917, judgment of the United States District Court for the Eastern District of Washington, Southern Division, holding terms at Yakima, in favor of the United States of America as

plaintiff and against the West Side Irrigating Company as defendant, was affirmed on an appeal from the above-entitled court, all as recorded in Volume 246 of Federal Reporter at page 212, and upon a *remittitur* from said United [14] States Circuit Court of Appeals being received at Yakima, Washington, the judgment of the lower court entered on the 19th day of February, 1916, was thereby affirmed, but no action has been taken thereon since the entry of the judgment.

II.

That at the time of the incorporation of said plaintiff in 1889, it appropriated water for irrigating purposes from the Yakima River in the County of Kittitas in said State of Washington, in the amount of four thousand miner's inches, at the user's distribution boxes, and commenced the use thereof during the summer of 1890, and since said date and up to the present time has been in uninterrupted and constant use of the water so appropriated, taking all thereof that it required for the purpose of its business and in supplying its stockholders up to the amount of four thousand miner's inches, at the user's distribution boxes, and at no time since said date and up to this time has such right of user been interfered with by any person or persons whomsoever and has so adversely used the same up to and including the present date.

III.

That on or about the 21st day of October, 1905, the said respondent sent to the plaintiff and its officers a duly authorized agent and employee, one T.

A. Noble, who solicited the said plaintiff to enter into an agreement in writing by which the water by it appropriated should be measured by cubic feet per second, of flow, instead of being determined by miner's inches as the same was originally taken and the usual way of measurement in the neighborhood, and after negotiating with the said Noble and taking his statements and representations, he being a hydraulic engineer of skill and attainment, the said plaintiff was induced to and did enter [15] into an agreement by which the water to be used in the conduct of its business should be eight cubic feet per second, and the contract was so executed, and at the time the said plaintiff and its officers believed, and were led to that conclusion by the statements made by the agent of the United States, that when they received eighty cubic feet per second of water it was equivalent to four thousand miner's inches at the users' distribution boxes, as by the plaintiff appropriated, and used when necessary, and the mistake and error was not discovered until the summer of of 1908 when the said Noble, then being in the employ of the State of Washington in doing hydraulic and irrigation work, but not then known to be so engaged by the plaintiff, came again to the plaintiff, and its officers, when having discovered the mistake about that time, the said plaintiff informed the said Noble of the mistake made and protested against being bound by the agreement as made, for the reason that a mistake had been made and the plaintiff had been deprived of a valuable right and of sufficient water to supply its stockholders as the amount appropriated

is necessary therefor, in order to produce the crops of the stockholders, covering about seven thousand acres and in grass, grains and other crops, such as are grown by irrigation in said district, and all of the land then being in a high state of cultivation, and that notwithstanding the fact that the said Noble was at said time in the employ of the State of Washington, the plaintiff believed that he was with and employed by the Reclamation Service of the United States, and did not know to the contrary, until this cause was being tried in the United States District Court during the year 1914.

IV.

That the plaintiff discovered when the protest was made [16] on the date aforesaid, and about that time, that four thousand miner's inches of water flow, at the users' distribution boxes, as determined by the custom and the decision of the Honorable Superior Court in and for the said County of Kittitas, where the rule was announced and long followed in the said district, would require a much larger amount than eighty cubic feet per second, which was not sufficient to protect and mature the crops growing in the district aforesaid.

V.

That the plaintiff, after having protested, believed that its rights were fully protected and that it would not be disturbed in any way, and that it would be entitled and permitted peaceably to use the amount of water by it appropriated and that the defendant would be duly informed by the said Noble, and the said plaintiff believed and understood *what* when it

gave the notice to the said Noble, who was in charge of the irrigation matters upon the Yakima River, and the chief therein, nothing further would be required of it in order to protect its rights, and that when said action was determined by this Court it was urged by the learned counsel for the defendant that because the protest against the effectiveness and binding force of the agreement aforesaid, limiting the amount of water, had not been communicated to the defendant, then and thereupon because of remaining silent the said protest became of no effect, and because of such conclusion the said Circuit Court of Appeals stated in its opinion as follows:

> "The stockholders gave no notice to any officer of the United States that they repudiated the contract but on the contrary by their silence they ratified the same"; and also "and there is no convincing evidence of a mistake on the part of the appellant or its stockholders."

which conclusion and the argument producing the same caused the said case to be determined adversely to this plaintiff, which [17] plaintiff alleges would not have occurred if all of the facts promptly disavowing the unauthorized acts of the corporate officers had been presented which were not then known, nor could they have been known, to this plaintiff.

VI.

That in the trial of the cause, and when taking the testimony, the said Noble was called as a witness by the United States, and he there testified from the witness-stand, and upon leaving the stand, at the suggestion of counsel for plaintiff, the vice-president of

the plaintiff Mitchell Stevens, immediately inquired of the said Noble if he did not notify the Reclamation Service about the protest and rights claimed in the summer of 1908 aforesaid, and thereupon the said Noble answered he had no such recollection, or words to that effect, and thereupon the said Stevens communicated this fact to his counsel, Carroll B. Graves, who was at the attorney's table, in the courtroom, where the testimony was being taken, of the answer that had been made, and the matter was then dismissed, believing that the said Noble had not communicated the fact to the officers of the Reclamation Service at Yakima or elsewhere.

VII.

That after said cause, brought by the United States as aforesaid, had been appealed to the United States Circuit Court of Appeals and for the first time, and information which it could not have before obtained, the said plaintiff learned that immediately after the protest was lodged with the said Noble as aforesaid, he, the said Noble, then and there communicated the fact of said protest to the officer of the United States in charge of all its irrigation affairs in the entire Yakima Valley in said State of Washington, which office was [18] at Yakima, in said district, and informed the said agent in charge of the same of the alleged mistake and of the intention of the said plaintiff and its stockholders to refuse to stand and abide by said agreement because of mistake and misunderstanding, the said discovery being on or about the 18th day of June, 1918, and that at the time of the trial of said cause the said agent in chief of said

reclamation service in said district was in court, and upon the stand as a witness, but did not disclose the fact of notice but kept the same from the Court and this plaintiff, and had he disclosed the fact the action would have been determined differently as shown by the decision of the United States Circuit Court of Appeals.

VIII.

That the said plaintiff was diligent in the preparation of its cause of action, and that it believed it had protected its rights and was taken completely by surprise when the defendant failed to admit receiving notice of such protest and showed by the witness Noble that he was not an officer of the United States Reclamation Service at the time the protest was made to him, and then believed that no such notice had been received and only by mere accident discovered it later on, and that if a new trial is granted it will be able to produce the testimony to fully convince the Court that it should prevail, and that the said T. A. Noble is a resident and citizen of the State of Washington, and has resided therein for more than thirty years last past, and that he will be produced as a witness on any new trial granted and will testify substantially as follows:

That during the years 1905 and 1906, he was in the employ of the Reclamation Service of the United States engaged on the Yakima River Projects of the said Reclamation [19] Service, and in his capacity had conferences with the officers and shareholders of the plaintiff company and was a party to securing the so-called "limiting agreement," whereby the plain-

tiff was induced to limit the use of its water to 80 cubic feet per second of time. That the said Noble left the employ of said Reclamation Service on the 1st day of January, 1907, but continued to reside at North Yakima, Washington; and that, in the year 1908, he was appointed by the Superior Court of Kittitas County as a Water Commissioner under the laws of the State of Washington for the counties of Kittitas and Yakima, and in the discharge of his duties, in the month of July, 1908, he went to the county of Kittitas for the purpose of regulating the flow of water from the Yakima River into the various canals, and while there he discussed the said limiting agreement with officers of the plaintiff company, and the said officers then and there stated that said company and its stockholders had been misled by their misunderstanding and by misrepresentation as to the effect of said agreement, and that they had understood and been given to understand that the amount placed in the agreement was equal to 4,000 inches of water according to the method used by the plaintiff company and as estimated and calculated by the plaintiff company and its stockholders theretofore, and that a mistake had been made and that the plaintiff company and its stockholders would not be bound by the limiting agreement, and protested against their being so bound because of the mistake aforesaid and the fact that they had been misled, and that they had used and would insist upon using the amount of 4,000 inches as measured by them through the distribution boxes of the stockholders, and that at about the time of the conversation aforesaid, the said Noble

measured the amount of water taken by the plaintiff, and that it exceeded [20] 80 cubic feet per second of time, and immediately thereafter he went to North Yakima to the Chief Officer of the Reclamation Service on the Yakima River projects, Charles H. Swigart, and related to him the interview had with the officers of the plaintiff company, and that the company was taking an amount in excess of 80 cubic feet per second, and that the officers of the plaintiff had protested and stated to the said Noble as aforesaid and that the plaintiff and its officers proposed to resist any attempt to reduce the amount of water to be taken by them to 80 cubic feet per second; and thereupon the said Swigart advised the said Noble not to proceed to enforce the said limiting agreement and to let the matter go as it was. That he, the said Noble, remembers that upon the trial of the case aforesaid he was a witness and that one Mitchell Stevens, an officer for the plaintiff company, inquired after he had left the stand, if he, the said Noble, did not convey the statement and protest made to him by the officers of the company, but the said Noble remarked that he didn't remember about it, and the incident at that time had passed from his mind. That long after said trial, to wit, in the summer of 1918, the said Mitchell Stevens called upon the said Noble concerning certain business, and after several conferences about other business matters, and after discussing what had occurred and what had been said by the officers of plaintiff company, the said Noble finally was able to recall that the things hereinbefore stated had been done and said. That at the

time the said Noble went to Kittitas County in 1908 as aforesaid, he did so for the purpose of enforcing the limitations prescribed by the said limiting agreement, and that the only parties interested in such enforcement were the Reclamation Service and its officers, and upon the statement of said [21] Swigart that nothing further should be done in the matter, the said Noble made no attempt to enforce said limiting agreement against the plaintiff, and that the only reason why said agreement was not attempted to be enforced by the said Noble as Water Commissioner aforesaid was because of having conveyed to the said Swigart the statements and protests made by the officers of the plaintiff company and the request of said Swigart not to proceed further after he had received the information so given him by the said Noble.

IX.

That the said plaintiff has been in the open, notorious and continuous use of all of the water appropriated by it when needed without let, hinderance or protest from any person or persons whomsoever, and by adverse user is entitled to have its rights adjudicated by which it shall be entitled in the future to use as in the past, the entire 4,000 miner's inches of water measured at the users' boxes, when the same is necessary and required upon the District served, and that it will be able to prove all of its rights as herein claimed and set forth and for which it asks a new trial, by T. A. Noble, J. H. Prater, F. A. Strandle, Mitchell Stevens, and John Burch, C. F. Kenneth, and W. A. Stevens, who will be in court as witnesses

when said action is heard again in the United States District Court for the Eastern District of Washington, Southern Division. That if the judgment and decree hereinbefore mentioned shall be continued in full force and effect and the plaintiff and its stockholders thereby perpetually limited to the use of 80 cubic feet of water per second of time, measured as prescribed by said decree, they will be greatly and irreparably damaged.

X.

That, because of the suppression of the fact by the defendant [22] of having had notice of said protest and reservation of rights, as fully set forth aforesaid, a manifest fraud and injustice was and has been visited upon and against the said plaintiff, to its great damage and detriment, and three years have not elapsed since the discovery of said fraud, and of the proof to right the wrong suffered. That, upon discovering the new evidence hereinbefore stated and suppressed as hereinbefore alleged, the plaintiff did not immediately file its bill of review; but, because of a change in the officers in charge of the Reclamation Service in the Yakima River projects, and believing that as agents of the United States such officers would endeavor to right the wrong imposed upon the plaintiff, it stated the newly discovered evidence to the officers then in charge, and the plaintiff was led to believe and believed that its application for redress was being favorably considered by the defendant and that plaintiff's application presented a matter of merit and equity to be considered by the defendant; and thereupon, plans and

methods were discussed orally and by correspondence to the end that an adjustment might be made abviating further trial or litigation, and such negotiations resulted in petitions being presented to defendant's departments and arguments being made thereon. That all of said matters were so pending at the time action was taken in the United States Circuit Court of Appeals resulting in the order allowing the plaintiff to file its original bill in this cause, and such action was taken by the plaintiff because it feared the loss of its rights by reason of the delays in the negotiations had with the defendant; and that the reason action was not sooner taken by the plaintiff and the original bill herein sooner filed was because the plaintiff and its officers were led to believe that on account of the injury which [23] had been done to the plaintiff by suppressing the new evidence aforesaid, it would be relieved from the wrong it had sustained by the decree without applying to this Court for redress and that the matter would be settled and adjusted without further contest or litigation.

XI.

That the said defendant is the user and seller of water taken from the Yakima River and its tributaries, not in its sovereign capacity, but in a private capacity, in a business *say,* the same as individuals or local corporations of the State of Washington for engaging in said business, and has no rights or more rights than those enjoyed and taken under the laws of the State of Washington, the said Yakima River and its tributaries being purely an intrastate stream.

XII.

That by reason of the discovery of the said new matter the said judgment ought to be reviewed and reversed, and this plaintiff granted a decree of this court affirming its right to all of the water by it originally appropriated and by it used without let or hindrance, since the time of the appropriation, so far as the same so appropriated, has been required for conducting the affairs of the plaintiff.

XIII.

That the plaintiff has had to expend for itself and is liable for a large bill of costs and expenses, and must expend a large amount still in costs, in preserving and defending its rights, all of which would not have been necessary or required if the defendant had not so suppressed the facts, which otherwise would have given a decree in plaintiff's favor, and because of the wrong done and fraud suffered, the said defendant should be adjudged to pay and required to [24] repay the same, and all thereof, to the plaintiff.

XIV.

That at no time since the rendition of the decree in said case No. 228, or the affirmance thereof by the Circuit Court of Appeals, has the defendant herein in any manner or form, by notice or otherwise, attempted or tried to enforce the decree, or any thereof, or in any manner interfere with the rights of the said plaintiff and its shareholders.

WHEREFORE, the said plaintiff prays:

(a) That said action be reviewed, considered, and a decree entered upon and in conformity with the

newly discovered evidence and rights set forth herein, and that testimony be received and taken under consideration, to aid the Court in conclusion:

(b) That the judgment heretofore rendered be reversed and set aside:

(c) That said cause of action may be heard on such new and supplemental matters and facts as may be offered, at the same time that it is reheard upon said original complaint;

(d) That plaintiff be allowed and permitted to amend its answer filed in the original cause, to comport to the facts hereinbefore set forth, and that the plaintiff be awarded judgment and decree of this court for the settling and determining of all of its rights to the water appropriated and used, as set forth in the complaint, and for all thereof, without protest, molestation or interference on the part of the defendant, or anyone acting through, by, or for it;

(e) That plaintiff may have and recover its costs and damages herein, and, [25]

(f) That plaintiff may have such other and further relief as shall be deemed just and equitable.

CARROLL L. B. GRAVES,
HARTMAN & HARTMAN,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

Mitchell Stevens, being first duly sworn, on oath says: That he is vice-president of the West Side Irrigating Company, the aforesaid plaintiff, and makes this verification for and on behalf of said company; that he has read the foregoing second amended

complaint, knows the contents thereof and that the same is true, as he verily believes.

MITCHELL STEVENS.

Subscribed and sworn to before me this 7th day of April, 1920.

HAROLD H. HARTMAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in the U. S. District Court, Eastern District of Washington, April 10, 1920. W. H. Hare, Clerk. [26]

In the District Court of the United States, for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Motion to Dismiss Second Amended Bill of Complaint.

Comes now the defendant in the above-entitled action and moves the Court to dismiss plaintiff's second amended bill of complaint and application to vacate the judgment entered on the 15th day of October, 1917, in the Circuit Court of Appeals for the Ninth

Circuit, affirming a judgment of the United States District Court for the Eastern District of Washington, Southern Division, in favor of the United States of America, as plaintiff, and against the West Side Irrigating Company, as defendant, and to deny plaintiff's application for relief, for the following reasons:

1. That the facts set forth in plaintiff's second amended bill of complaint are not sufficient to require this defendant to answer herein.

2. That plaintiff's said second amended bill of complaint is without equity and plaintiff is not entitled to any relief.

3. That said second amended bill of complaint, in its first paragraph, refers to the judgment of this Court heretofore rendered and to the judgment of the Circuit Court of Appeals for the Ninth Circuit, affirming said judgment on appeal, and by reference embodies the proceedings [27] had therein, of which this Court will take judicial knowledge, and it affirmatively appears therefrom that plaintiff seeks relief herein upon grounds different and variant from those asserted in the original case.

4. That further comparison of the second amended bill of complaint with the record in the original cause referred to in paragraph one of said second amended complaint, shows that the representations upon which relief is now sought are not true in this: That the suggestions of fraud set forth in the second amended bill of complaint are based upon the statements that one, Charles H. Swigart, chief officer of the Reclamation Service, was present in court and upon the witness-stand at the previous trial, and failed to dis-

close the evidence alleged to have been suppressed, when the record in the former trial conclusively shows that said Charles H. Swigart was never a witness in said case at all.

5. That the allegation in said second amended bill of complaint that plaintiff was misled by its officers or agents is not sufficient to amount to an allegation of fraud, and is inadequately pleaded; the allegations that the officers of the Government suppressed evidence being mere gratuitous conclusions, based in the most favorable view upon the carelessness and inexcusable neglect of plaintiff in not having discovered the evidence alleged to have been suppressed; that plaintiff herein, on said former trial, made no effort whatever to support any allegation that the company had given notice to the United States of the renunciation of the contract, either by questioning T. A. Noble, who was a witness, or by calling said Charles H. Swigart, Supervising Engineer of the United States Reclamation Service, who was not a witness. [28]

6. That the said matter alleged as newly discovered evidence is cumulative, immaterial and not controlling, and that there is ample in the record to sustain the findings and decisions made by the District Court and the Circuit Court of Appeals in said cause on other grounds than those stated in the second amended bill of complaint; that even if the facts set forth in the second amended bill of complaint, which are alleged to show an attempt to give notice of the renunciation of the contract, had in fact been communicated to the United States as stated, it clearly

appears that this so-called notice was casual, incidental, informal and by hearsay only, and entirely fails to meet that clear, unmistakable, unequivocal, absolute and final renunciation which the law required as a basis for the abrogation of a contract.

7. That conceding the allegations of the second amended bill of complaint, it appears from the stipulation in the record that the attempted renunciation was made too late to be available as an abrogation of contract, for the reason that it conclusively appears from the undisputed evidence offered in the former case, referred to in paragraph one of said second amended bill of complaint, that at the time of the alleged notice, the said contract was no longer executory as regards the United States; but that the United States, prior thereto, had expended vast sums in reliance upon the contract, and further, that the Government could not again be placed in the position it was before the contract was signed, and would, therefore, have been entitled to disregard said notice, even if given, as alleged in said second amended complaint, and would be at liberty to treat the contract as still binding and institute its action as it did. [29]

8. That the alleged newly discovered evidence set forth in the second amended bill of complaint seeks to abrogate the defense of estoppel; but the allegations thereof would not avail the plaintiff corporation for that purpose, since the stipulation of the parties in the record in the former action, referred to in paragraph one of plaintiff's second amended bill of complaint, conclusively shows that prior to the alleged notice of renunciation claimed to have been

given to T. A. Noble, the Secretary of the Interior, had already approved the Yakima Project and purchased the irrigation system for the Sunnyside Unit thereof and expended large sums in reliance upon plaintiff's contract and those of others of similar tenor:

9. That the plaintiff herein is guilty of laches in bringing its action for relief from the judgment heretofore rendered; that the uncontradicted evidence in the transcript of record in the former trial referred to in paragraph one of plaintiff's second amended bill of complaint herein conclusively shows that this plaintiff corporation had knowledge that the contract in question limited it to the use of a less amount of water than it now claims it understood was to be its portion as early as in January, 1906, and at said time had determined to resist the enforcement of the agreement; but according to its own showing, as set forth in the second amended complaint herein, it failed and neglected and made no effort to notify the United States, or any of its agents or supposed agents, of this fixed intent to rescind or repudiate the contract until the summer of 1908, at which time the Government had already expended approximately $1,263,000.00, all of which was sufficient to warrant the findings made by the Court, in the former action and sustained by its judgment. [30]

10. That plaintiff herein is further guilty of laches in bringing its action for relief from the judgment heretofore rendered, as it appears from the second amended complaint that the opinion of the Circuit Court of Appeals was rendered October 5, 1917; that

plaintiff became acquainted with the facts set forth in said second amended bill of complaint as early as June, 1918, and the facts set forth as justification for the delay in bringing the action for relief are not sufficient to relieve the plaintiff from the imputation of laches.

11. It affirmatively appears from said second amended bill of complaint that said plaintiff has failed, neglected and refused to conform to the decree of the Court entered herein, and said application for relief is an abuse of the administration of justice, applied for in the hope of protracting the litigation and for the purpose of delaying the enforcement of the decree.

FRANCIS A. GARRECHT,
United States Attorney.

Filed April 10, 1920. W. H. Hare, Clerk. [31]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order and Judgment Granting Motion to Dismiss.

The plaintiff having filed herein its second amended bill of complaint, and the defendant, by its attorneys, having moved to dismiss said second amended bill of complaint, said motion being in the nature of a demurrer to said second amended bill, and the same having been submitted to the Court, it is

ORDERED: That said motion to dismiss be, and the same is hereby sustained; and the plaintiff having declined to plead further and electing to stand on said second amended bill of complaint, it is

ORDERED, ADJUDGED and DECREED that second amended bill of complaint be, and the same is hereby dismissed, and the above-entitled action and proceeding be, and the same hereby is dismissed.

To the above ruling and judgment of the court, the plaintiff excepts and such exception is allowed.

Dated this 12th day of April, A. D. 1920.

FRANK H. RUDKIN,
Judge.

Filed April 12th, 1920. W. H. Hare, Clerk. [32]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Petition for Allowance of Appeal.

The above-named plaintiff in the above-entitled cause feeling itself aggrieved by the judgment and decree rendered against it in said cause, on the 12th day of April, 1920, prays the Court to allow it an appeal from the said judgment and decree to the United States Circuit Court of Appeals, for the Ninth Circuit, and to fix *in* an order allowing said appeal and the amount of the bond required for costs.

JOHN P. HARTMAN,
CARROLL B. GRAVES,
Attorneys for Plaintiff.

Due service and receipt of copy of foregoing petition is hereby acknowledged this 14th day of June, 1920.

F. A. GARRECHT,
Attorneys for Defendant.
By C. H. L.

Filed in the U. S. District Court, Eastern District of Washington, June, 12, 1920. W. H. Hare, Clerk. [33]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Assignment of Errors.

Plaintiff assigns as errors, upon which it will reply in the United States Circuit Court of Appeals for reversal of the decree and judgment of the Trial Court, the following:

I.

The Trial Court erred in holding that the second amended complaint herein does not state facts sufficient to constitute a cause of action, nor facts sufficient to entitle plaintiff to the relief sought, and in granting defendant's motion to dismiss the same.

II.

The Trial Court erred in dismissing the second amended complaint upon the ground of laches and want of equity.

III.

The Trial Court erred in rendering and entering its decree dismissing this action and giving judgment against plaintiff for costs.

JOHN P. HARTMAN,
CARROLL B. GRAVES,
Attorneys for Plaintiff.

Due service and receipt of copy of foregoing Assignment of Errors is hereby acknowledged this 14th day of June, 1920.

F. A. GARRECHT,
By C. H. L.
Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington, June 12, 1920. W. H. Hare, Clerk. [34]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Order Allowing Appeal.

This cause coming on to be heard upon the petition of the plaintiff herein, for an allowance of the appeal

from the decree and judgment rendered herein on the 12th day of April, 1920, and the Court having heard said petition and the assignments of error having been filed herein,—

IT IS ORDERED that the said appeal be and the same is hereby allowed, and the plaintiff and appellant shall give a cost bond on appeal for the sum of Two Hundred Dollars.

Dated, this 12th day of June, 1920.

FRANK H. RUDKIN,
Judge.

Filed in the U. S. District Court, Eastern District of Washington, June 12, 1920. W. H. Hare, Clerk. [35]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

Citation.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the 9th Circuit, to be holden at the city of San

Francisco, California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal entered in the clerk's office for the Eastern District of Washington, Southern Division, in that certain suit No. 741, wherein the West Side Irrigating Company is plaintiff and appellant, and United States of America is defendant and appellee, to show cause, if any there be, why the decree of dismissal of said cause and judgment against plaintiff for costs should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS Honorable ————, Chief Justice of the Supreme Court of the United States, this 12th day of June, 1920.

FRANK H. RUDKIN,
Judge.

Due service of foregoing citation is admitted this 14th day of June, 1920.

F. A. GARRECHT,
By C. H. L.,
Attorney for Defendant. [36]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, The West Side Irrigating Company, a corporation, as principal, and Mitchell Stevens, John A. Yearwood, J. H. Prater, and G. W. Weaver, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of Two Hundred Dollars, to be paid to the said defendant, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 4th day of June, 1920.

WHEREAS, lately at a session of the United States District Court for the Eastern District of Washington, Southern Division, in a suit pending in said court between the above-named plaintiff and the above-named defendant, a decree and judgment was rendered in said cause, dismissing said cause

with costs, against the above-named plaintiff; and

WHEREAS, said plaintiff has sustained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the 9th Circuit, to reverse the aforesaid decree and judgment rendered on the 12th day of April, 1920, and a Citation directing the above-named defendant and appellee is about to be issued citing and admonishing the said defendant to appear at the [37] United States Circuit Court of Appeals for the 9th Circuit, to be holden at San Francisco, California.

Now, the condition of the above obligation is such that, if the above-named plaintiff shall prosecute said appeal to effect, and shall answer all costs which shall be awarded against it if it shall fail to make good its plea, then the above obligation shall be null and void; otherwise it shall remain in full force and virtue.

WEST SIDE IRRIGATING COMPANY,
By MITCHELL STEVENS,
Vice-president.

State of Washington,
County of Kittitas,—ss.

Mitchell Stevens and John A. Yearwood and J. H. Prater and G. W. Weaver, being first duly sworn, on oath, each for himself says, that he is a resident and citizen of said county and state, and one of the sureties in the foregoing bond; that he is worth in his own individual right, above all debts, liabilities and exemptions, the sum of above Two Thousand ($2,000.00) Dollars, subject to levy by execution, that he is neither sheriff, court officer, nor attorney at law,

is a freeholder of said county, and state, and an elector thereof.

MITCHELL STEVENS.
JOHN A. YEARWOOD.
J. H. PRATER.
G. W. WEAVER.

Subscribed and sworn to before me this 11th day of June, 1920.

A. T. GREGORY,
Notary Public in and for the State of Washington
Residing at ———.

Approved as to form and sufficiency of sureties this 12th day of June, 1920.

FRANK H. RUDKIN,
Judge.

Filed in the U. S. District Court, Eastern District of Washington. June 12, 1920. W. H. Hare, Clerk. [38]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

Order Striking Motion to Dismiss Amended Bill of Complaint, etc.

This cause coming on to be heard on the 23d day of March, 1920, at Yakima, upon the motion of the defendant to dismiss the plaintiff's amended bill of complaint, and application to vacate the judgment, and for other relief, as set forth in said pleading, the said plaintiff being represented by its attorneys Carroll B. Graves and Hartman & Hartman, and the defendant being represented by its attorneys Francis A. Garrecht and E. W. Burr, and the Court being fully advised in the premises, finds that the said motion, so called, is in conflict with the rules of pleading and practice and the general principles of law governing this court, because it is an attempt to try the merits of the action, and to bring matters before the court beyond the pleading, to wit, the amended complaint, and because thereof, the same should be stricken, except that the parties may proceed upon the same, and to be considered, as a general demurrer against the amended bill, and to be so argued and presented.

IT IS, THEREFORE, ORDERED that the said motion and all thereof be stricken and held for naught, except that the defendant may present under the pleading filed its demurrer, based upon the ground that the amended complaint does not state facts sufficient to constitute a cause of action, to which all counsel agree, and as such may be argued at this time.

Done in open court this 29th day of March, 1920.

FRANK H. RUDKIN,
Judge.

Filed in the U. S. District Court, Eastern District of Washington, March 30, 1920. Wm. H. Hare, Clerk. By Edward E. Cleaver, Deputy. [39]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Amended Bill of Complaint.

Comes now the said plaintiff above named and by leave of Court first had and obtained, files this its amended bill in equity in the nature of a bill or review of the judgment hereinafter referred to and for cause of action states as follows:

I.

That the said plaintiff is a corporation duly formed and existing under and by virtue of the laws of Washington with its principal place of business at Ellensburg in said state, and that it was incorporated for the purpose of appropriating and using water for irrigation purposes taken from the Yakima River,

and distributing the same to its stockholders, and has been in such business uninterruptedly since on or about the first day of July, 1890, and that on the fifteenth day of October, 1917, judgment of the United States District Court for the Eastern District of Washington, Southern Division, holding terms at Yakima, in favor of the United States of America as plaintiff and against the West Side Irrigating Company as defendant, was affirmed on an appeal from the above-entitled court, all as recorded in Volume 246 of Federal Reporter at page 212, and upon a *remittitur* from said United States Circuit Court of Appeals being received at Yakima, Washington, the judgment of the lower court entered on the nineteenth day of February, 1916, was thereby affirmed, but no action has been taken thereon since the [40] entry of the judgment.

II.

That at the time of the incorporation of said plaintiff in 1889, it appropriated water for irrigating purposes from the Yakima River in the County of Kittitas in said State of Washington, in the amount of four thousand miner's inches, at the users' distribution boxes, and commenced the use thereof during the summer of 1890, and since said date and up to the present time has been in uninterrupted and constant use of the water so appropriated, taking all thereof that it required for the purpose of its business and in supplying its stockholders up to the amount of four thousand miner's inches, at the users' distribution boxes, and at no time since said date and up to this time has such right of user been interfered

with by any person or persons whomsoever and has so adversely used the same up to and including the present date.

III.

That on or about the twenty-first day of October, 1905, the said respondent sent to the plaintiff and its officers a duly authorized agent and employee, one T. A. Noble, who solicited the said plaintiff to enter into an agreement in writing by which the water by it appropriated should be measured by cubic feet per second of flow, instead of being determined by miner's inches as the same was originally taken and the usual way of measurement in the neighborhood, and after negotiating with the said Noble and taking his statements and representations, he being a hydraulic engineer of skill and attainment, the said plaintiff was induced to and did enter into an agreement by which the water to be used in the conduct of its business should be eighty cubic feet per second, and the contract was so executed, and at the time the said plaintiff and its officers believed, and were led to that conclusion by the statements made by the agent of the United States, [41] that when they received eighty cubic feet per second of water it was equivalent to four thousand miner's inches at the users' distribution boxes, as by the plaintiff appropriated, and used when necessary, and the mistake and error was not discovered until the summer of 1908 when the said Noble, then being in the employ of the State of Washington in doing hydraulic and irrigation work, but not then known to be so engaged by the plaintiff, came again to the plaintiff, and its officers, when, having dis-

covered the mistake about that time, the said plaintiff informed the said Noble of the mistake made and protested against being bound by the agreement as made, for the reason that a mistake had been made and the plaintiff had been deprived of a valuable right and of sufficient water to supply its stockholders as the amount appropriated is necessary therefor, in order to produce the crops of the stockholders covering about seven thousand acres and in grass grains and other crops, such as are grown by irrigation in said district, and all of the land then being in a high state of cultivation, and that notwithstanding the fact that the said Noble was at said time in the employ of the State of Washington, the plaintiff believed that he was with and employed by the Reclamation Service of the United States, and did not know to the contrary, until this cause was being tried in the United States District Court during the year 1914.

IV.

That the plaintiff discovered when the protest was made on the date aforesaid, and about that time, that four thousand miner's inches of water flow, at the users' distribution boxes, as determined by the custom and the decision of the Honorable Superior Court in and for the said County of Kittitas, where the rule was announced and long followed in the said district, would require a much larger amount than eighty cubic feet per second, which was not sufficient to protect and mature the crops growing [42] in the district aforesaid.

V.

That the plaintiff, after having protested, believed

that its rights were fully protected and that it would not be disturbed in any way, and that it would be entitled and permitted peaceable to use the amount of water by it appropriated and that the defendant would be duly informed by the said Noble, and the said plaintiff believed and understood that when it gave the notice to the said Noble, who was in charge of the irrigation matters upon the Yakima River, and the chief therein, nothing further would be required of it in order to protect its rights, and that when said action was determined by this Court it was urged by the learned counsel for the defendant that because the protest against the effectiveness and binding force of the agreement aforesaid, limiting the amount of water, had not been communicated to the defendant, then and there upon because of remaining silent the said protest became of no effect, and because of such conclusion the said Circuit Court of Appeals stated in its opinion as follows:

> "The stockholders gave no notice to any officer of the United States that they repudiated the contract, but on the contrary, by their silence, they ratified the same";

which conclusion and the argument producing the same cause the said case to be determined adversely to this plaintiff, which plaintiff alleges would not have occurred if all of the facts had been presented which were not then known, nor could they have been known, to this plaintiff.

VI.

That in the trial of the cause, and when taking the testimony, the said Noble was called as a witness by

the United States, and he there testified from the witness-stand, and upon leaving the stand, at the suggestion of counsel for plaintiff, the vice-president [43] of the plaintiff, Mitchell Stevens, immediately inquired of the said Noble if he did not notify the Reclamation Service about the protest and rights claimed in the summer of 1918 aforesaid, and thereupon the said Noble answered he had no such recollection, or words to that effect, and thereupon the said Stevens communicated this fact to his counsel, Carroll B. Graves, who was at the attorneys' table, in the courtroom, where the testimony was being taken, of the answer that had been made, and the matter was then dismissed, believing that the said Noble had not communicated the fact to the officers of the Reclamation Service at Yakima or elsewhere.

VII.

That after said cause, brought by the United States as aforesaid, had been appealed to the United States Circuit Court of Appeals and for the first time, and information which it could not have before obtained, the said plaintiff learned that immediately after the protest was lodged with the said Noble as aforesaid, he, the said Noble, then and there communicated the fact of said protest to the officer of the United States in charge of all of its irrigation affairs in the entire Yakima Valley in said State of Washington, which office was at Yakima, in said district, and informed the said agent in charge of the same of the alleged mistake and of the intention of the said plaintiff and its stockholders to refuse to stand and abide by said

agreement because of mistake and misunderstanding, the said discovery being on or about the 18th day of June, 1918, and that at the time of the trial of said cause the said agent in chief of said Reclamation Service in said district was in court, and upon the stand as a witness, but did not disclose the fact of notice but kept the same from the Court and this plaintiff, and had he disclosed the fact the action would have been determined differently as shown by the decision of the United States Circuit Court of Appeals. [44]

VIII.

That said plaintiff was diligent in the preparation of its cause of action, and that it believed it had protected its rights and was taken completely by surprise when the defendant by its witness denied any notice of such protest, and that the witness Noble was not an officer of the United States Reclamation Service at the time the protest was made to him, and then believed that no such notice had been received and only by mere accident discovered it later on, and that if a new trial is granted it will be able to produce the testimony to fully convince the Court that it should prevail.

IX.

That the said plaintiff has been in the open, notorious and continuous use of all the water appropriated by it when needed without let, hindrance, or protest from any person or persons whomsoever, and by adverse user is entitled to have its rights adjudicated by which it shall be entitled in the future to used as in the past, the entire four thousand miner's

inches of water measured at the users' boxes, when the same is necessary and required upon the district served, and that it will be able to prove all of its rights as herein claimed and set forth and for which it asks a new trial, by T. A. Noble, J. H. Prater, F. A. Strande, Mitchell Stevens, and John Burch, C. F. Kenneth, and W. A. Stevens, who will be in court as witnesses when said action is heard again in the United States District Court for the Eastern District of Washington, Southern Division, and that by reason of the judgment and decree made as aforesaid, if the same is put into effect (altho it has never been enforced but may be at any time), this plaintiff and its stockholders have been greatly damaged and will be irreparably damaged if the decree is allowed to be enforced. [45]

X.

That, because of the suppression of the fact by the defendant, of having had notice of said protest and reservation of rights, as fully set forth aforesaid, a manifest fraud and injustice was and has been visited upon and against the said plaintiff, to its great damage and detriment, and three years have not elapsed since the discovery of said fraud, and of the proof to right the wrong suffered.

XI.

That the said defendant is the user and seller of water taken from the Yakima River and its tributaries, not in its sovereign capacity, but in a private capacity, in a business way, the same as individuals or local corporations of the State of Washington for engaging in said business, and has no rights or

more rights than those enjoyed and taken under the laws of the State of Washington, the said Yakima River and its tributaries being purely an intrastate stream.

XII.

That by reason of the discovery of the said new matter the said judgment ought to be reviewed and reversed, and this plaintiff granted a decree of this Court affirming its right to all of the water by it originally appropriated, and by it used without let or hindrance, since the time of the appropriation, so far as the same so appropriated has been required for conducting the affairs of the plaintiff.

XIII.

That the plaintiff has had to expend for itself and is liable for a large bill of costs and expenses, and must expend a large amount still in costs, in preserving and defending its rights, all of which would not have been necessary or required if the defendant had not so suppressed the facts, which otherwise would have given a decree in plaintiff's favor, and because of the wrong [46] done and fraud suffered, the said defendant should be adjudged to pay and required to repay the same, and all thereof, to the plaintiff.

XIV.

That at no time since the rendition of the decree in said case No. 228, or the affirmance thereof by the Circuit Court of Appeals, has the defendant herein in any manner or form by notice or otherwise, attempted or tried to enforce the decree, or any thereof,

or in any manner interfere with the rights of the said plaintiff and its shareholders.

WHEREFORE, the said plaintiff prays:

(a) That said action be reviewed, considered, and a decree entered upon and in conformity with the newly discovered evidence and rights set forth herein, and that testimony be received and taken under consideration, to aid the Court in conclusion;

(b) That the judgment heretofore rendered be reversed and set aside;

(c) That said cause of action may be heard on such new and supplemental matters and facts as may be offered, at the same time that it is reheard upon said original complaint;

(d) That plaintiff be allowed and permitted to amend its answer filed in the original cause, to comport to the facts hereinbefore set forth, and that the plaintiff be awarded judgment and decree of this Court for the settling and determining of all of its rights to the water appropriated and used, as set forth in the complaint, and for all thereof, without protest, molestation or interference on the part of the defendant or anyone acting through, by, or for it;

(e) That plaintiff may have and recover its costs and damages herein; and,

(f) That plaintiff may have such other and further relief as shall be deemed just and equitable.

CARROLL B. GRAVES,
HARTMAN & HARTMAN,
Attorneys for Plaintiff.

Filed March 23, 1920. W. H. Hare, Clerk. [47]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATION COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Opinion.

HARTMAN & HARTMAN and CARROLL B. GRAVES, for Plaintiff.

FRANCIS A. GARRECHT, U. S. Attorney, and E. W. BURR, District Counsel U. S. Reclamation Service, for Defendant.

RUDKIN, District Judge.

This is a bill in the nature of a bill of review to obtain a rehearing or reconsideration of a case finally determined by this Court and affirmed by the Circuit Court of Appeals.

United States v. West Side Irrigation Co., 230 Fed. 284.

West Side Irrigation Co. v. United States, 246 Fed. 212.

The parties are here reversed, but for convenience will be referred to as plaintiff and defendant as in the original proceeding. The suit was originally brought to restrain the defendant from diverting

water from the Yakima River in violation of a certain limiting agreement, a copy of which is set forth in the two opinions referred to. A final decree was entered in favor of the plaintiff in accordance with the prayer of the complaint. The opinion of the Circuit Court of Appeals affirming the decree was filed on the 15th day of October, 1917, and the mandate or *remittitur* from that court was filed in the District Court on the [48] 28th day of November, 1917. On the 3d day of September, 1919, an order was entered in the Appellate Court granting the defendant permission to present to the District Court the present bill of complaint and to apply to that Court for leave to file the same. On the same date a *pro forma* order was entered in this court permitting the filing of the bill and directing process to issue. Pursuant to this order the bill was filed, and the case is now before the Court on motion to dismiss the bill as amended by stipulation, for want of sufficient facts, for want of equity, and upon the ground of laches. A statement of the issues determined on the final hearing in the trial and appellate courts, together with a statement of the newly discovered evidence, will dispose of the case without further argument or comment. The issues are thus stated in the opinion of the Trial Court;

> "It is conceded throughout the testimony that the defendant has diverted water from the river in excess of 80 cubic feet per second of time, and it asserts the right to do so upon three grounds: First, because the limiting agreement was *ultra vires* and void; second, because the

water should be measured at the several points where it is diverted from the canal by the different stockholders or users, and not at the intake of the canal, or at least that such was the understanding of the defendant; and, third, that the defendant at all times claimed the right to divert and use 4,000 inches of water measured according to the system or module adopted by it; that it was represented to the defendant that 80 cubic feet per second was the equivalent of the 4,000 inches thus measured, while in truth and in fact the 4,000 inches as measured by the defendant is the equivalent of upwards of 90 cubic feet per second; and it is claimed that the difference between the 80 cubic feet per second, measured at the intake, and the 4,000 inches as measured by the defendant at the points of delivery to the different stockholders, is 24.6 cubic feet per second. In other words, the defendant claims and asserts the right to divert from the river 104.6 cubic feet per second, while the government claims that it is limited to 80 cubic feet per second."

The Trial Court then held that the defense of *ultra vires* could not prevail for two reasons: First, because no such defense was interposed by answer; and second, because the stockholders had notice of the limiting agreement soon after its execution, and it then became their imperative duty either to abide by the agreement, [49] or promptly disavow the unauthorized acts of the corporate officers and bring notice of such disavowal home to the Government or

to some authorized officer of the Government. The Court further found that there was no mistake of fact, either as to the place of measurement or as to quantity of water, and that the agreement was founded upon an adequate consideration.

Some new questions seem to have been raised in the Circuit Court of Appeals. That Court held: First, that there was no merit in the contention that the complaint was insufficient to state a cause of action, in that it did not show that the United States or anyone in privity with it had been deprived of the use of water or had sustained a present injury; second, that there was no merit in the contention that the United States had no authority to maintain the action; and disposed of the claim of mistake in the following language:

> "The suggestion that the agreement was founded upon mistake cannot avail the appellant. There is no evidence whatever that there was a mutual mistake. And there is no convincing evidence of a mistake on the part of the appellant or its stockholders. And if, indeed, there was a mistake on their part, they waived the right to assert it by their subsequent silence. There is no plea of mistake in the answer to the complaint. The whole defense of the appellant as pleaded rests upon its construction and conception of the terms of the agreement itself."

The Court further held that there were two answers to the claim on the part of the defendant that the limiting agreement was void.

> "First, that no such defense is pleaded in the answer; and second, that the stockholders gave no notice to any officer of the United States that they repudiated the contract, but, on the contrary, by their silence they ratified the same."

The claim of newly discovered evidence is substantially this: One T. A. Noble was an officer of the Reclamation Service of the United States on the 21st day of October, 1905, when the limiting agreement was executed; at that time the defendant believed that the 80 cubic feet of water per second was the equivalent of 4,000 inches measured at the distributing boxes of the different [50] users and did not discover the mistake until the summer of 1908; at the time of such discovery the defendant informed Noble thereof and entered a protest against being bound by the agreement as made, for the reason that it deprived the defendant of valuable rights and of sufficient water to supply its stockholders; at the time of the giving of such notice the defendant erroneously believed that Noble was still in the employ of the United States, and did not discover that Noble was not then in the employ of the United States until he testified on the trial of this case some seven or eight years later; when Noble left the witness-stand he was asked by one of the officers of the defendant whether he had conveyed the information thus given him to the officers of the Reclamation Service, and he answered in the negative; the defendant has since discovered that this information was in fact conveyed by Noble to the officers of the Reclamation Service, "and that if a new trial is granted

it will be able to produce testimony to fully convince the Court that it should prevail." It is further claimed that the plaintiff suppressed testimony at the original trial, and was therefore guilty of fraud.

Assuming that all this testimony is newly discovered, and assuming further that it was all before the court on the former hearing, in what conceivable way could it change the result? There were only two issues in the case upon which the proffered testimony could have the slightest bearing. First, on the question whether the limiting agreement was obligatory upon the defendant; and second, whether the execution of that agreement was the result of mistake, either as the place of measurement or quantity of water to be diverted. The first issue was decided against the defendant upon two grounds: First, because no such defense was made at the trial, or rather, presented by the answer; and second, because "the stockholders gave no notice to any officer of the [51] United States that they repudiated the contract, but, on the contrary, by their silence they ratified the same."

The newly discovered evidence has no bearing upon this latter issue, because it is not claimed that either Noble or the Reclamation Service was notified that the contract was executed without authority, and in that respect the record upon which the former decision was based has not been changed. Noble was simply notified that the defendant claimed that there was a mistake of fact as a result of which it was deprived of water to which it was lawfully entitled, but inasmuch as both courts found that there was

no such mistake how can this notice avail the defendant, or how could the new evidence change the result? On the question of mistake the Circuit Court of Appeals likewise found against the defendant on several grounds, namely:

> "There is no evidence whatever that there was a mutual mistake. And there is no convincing evidence of a mistake on the part of the appellant or its stockholders. And if, indeed, there was a mistake on their part, they waived the right to assert it by answer to the complaint. The whole defense of the appellant as pleaded rests upon its construction and conception of the terms of the agreement itself."

The decree was therefore affirmed on several grounds, and the silence of the defendant was only incidentally referred to. Indeed, in the view of the Trial Court and the Appellate Court the issue now sought to be raised was not presented by the pleadings in the original case, and the defendant is merely seeking a trial *de novo* on an entirely new theory, utterly disregarding the former trial and the finality of the former decision. For this reason alone the bill of complaint is entirely insufficient. Again, the newly discovered evidence was brought to the attention of the defendant fifteen months before the present proceedings were instituted, and such delay alone is sufficient to defeat the application. Under the statutes of this state a judgment may be vacated for certain [52] reasons within one year, but the Supreme Court has uniformly held that the

moving party must act with diligence even within the year.

> Nelson v. Nelson, 56 Wash. 571, and cases cited.

And while the decision of the state court is not absolutely controlling here, the rule announced is a fundamental one.

What has already been said fully answers the charge of fraud. Furthermore, I am not aware that any obligation rested upon the Government to prove any part of the case of its adversary. As said by the Supreme Court in McDougall vs. Walling, 21 Wash. 478:

> "It cannot be the rule that a judgment can be attacked for fraud because in the trial the prevailing party defendant failed to voluntarily disclose the weakness of his defense, or some evidence which would tend to overthrow his defense. Ordinarily, the pleadings must determine what issues will be tried; and it has never seemed to be the practice that a party must disclose to his adversary what his testimony will be, or that he must suggest testimony for his adversary."

It is apparently insisted at this time that the Court has already passed upon the sufficiency of the showing as to the newly discovered evidence in permitting the bill to be filed, and that that question is now foreclosed. If counsel is correct in this, the error of the Court in permitting the bill to be filed without notice to the adverse party becomes at once apparent. But in any view of the case the position is untenable.

Even had the Court passed directly upon that question at an earlier stage of the trial the Court has still full jurisdiction of the case and it is its plain duty to correct the palpable error thus committed. I may say in conclusion that I deemed it best to dispose of the application upon its merits, rather than upon technical questions of procedure advanced at the hearing. Perhaps the better practice is to sign an order requiring adverse party to show cause why the bill should not be filed, but whether the sufficiency of the showing made be determined before or after the filing of the bill is a matter of form rather than of substance.

The motion to dismiss is sustained. [53]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATION COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Memorandum Opinion.

HARTMAN & HARTMAN and CARROLL B. GRAVES, for Plaintiff.

FRANCIS A. GARRECHT, U. S. District Attorney, and E. W. BURR, District Counsel U. S. Reclamation Service, for Defendant.

RUDKIN, District Judge.

The plaintiff has asked leave to file a second amended bill of complaint in this case, stipulating that the bill as amended may be considered by the Court on motion to dismiss without further argument. I assume that the amendment is proposed solely for the purpose of making a record for the Appellate Court, as the changes do not meet or obviate the defects found in the former bills. The motion for leave to amend is granted, and the motion to dismiss interposed by the Government will be sustained.

Let a final decree be entered accordingly.

Filed April 12th, 1920. W. H. Hare, Clerk. [54]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 741.

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Praecipe for Transcript of Record.

To the Honorable, the Clerk of said Court:

Comes now the plaintiff by its attorneys of record and requests you to make a transcript for appeal of

this case to the Circuit Court of Appeals, pursuant to order made, and include therein (omitting, however, formal matters from any page or record where not needed to give the Court information), the following:

1. Petition for leave to file bill.
2. Order of Court allowing filing of bill.
3. Application of plaintiff to file amended bill.
4. Order of Court allowing filing of amended bill.
5. Application of plaintiff to file second amended bill.
6. Order of Court allowing filing second amended bill.
7. Second amended bill.
8. Motion of defendant to dismiss second amended bill.
9. Order sustaining motion dismissing bill and granting judgment.
10. Petition for appeal.
11. Assignment of errors.
12. Order of Court allowing appeal.
13. Citation.
14. Bond on appeal.

Dated this 17th day of June, 1920.

CARROLL B. GRAVES,
HARTMAN & HARTMAN,
Attorneys for Defendant.

REQUESTED BY DEFENDANT.

Amended Complaint, filed March 23, 1920.
Opinion, filed March 30, 1920.
Opinion, filed April 12, 1920.

FRANCIS A. GARRECHT,
Attorney for Defendant. [55]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages to be a full, true, correct and complete copy of the record and all proceedings had in said action as called for in the praecipe for a transcript of the record herein, as the same remains of record and on file in the office of the clerk of said court; and that the same constitutes the record on appeal from the order, judgment and decree of said District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of ($25.85) Twenty-five Dollars and Eighty-five Cents, and that the same has been paid to me by attorneys for the appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at the city of Spokane, in said district, this 29th day of June, A. D. 1920, the Independence of the United States of America the one hundred and forty-fourth.

[Seal] W. H. HARE,
Clerk. [56]

[Endorsed]: No. 3518. United States Circuit Court of Appeals for the Ninth Circuit. The West Side Irrigating Company, a Corporation, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed July 1, 1920.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3518

United States Circuit Court of Appeals

For The Ninth Circuit

THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Appellant,

—vs.—

THE UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Eastern District of Washington Southern Division.

HON. FRANK H. RUDKIN, Presiding.

BRIEF OF APPELLANT

CARROLL B. GRAVES,
606-8 Central Bldg., Seattle, Wash.,

HARTMAN & HARTMAN,
300-6 Burke Bldg., Seattle, Wash.,

Attorneys for Appellant.

THE ARGUS PRESS, SEATTLE

No. 3518

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THE WEST SIDE IRRIGATING COMPANY, a Corporation,

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United States Circuit Court of Appeals

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THE WEST SIDE IRRIGATING COMPANY, a Corporation,

Appellant,

—vs.—

THE UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Eastern District of Washington Southern Division.

HON. FRANK H. RUDKIN, Presiding.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

This is a Bill in the nature of a bill of review of the decree of the District Court for the Eastern District of Washington, Southern Division, rendered February 19th, 1916, affirmed by the Circuit Court of Appeals for the Ninth Circuit October 15th, 1917,

in favor of the United States of America and against West Side Irrigation Company, whereby appellant was enjoined from diverting from the Yakima river in excess of 80 cubic feet per second of water, as specified in the so-called "limiting agreement" of October 21st, 1905, which appellant was induced to sign, upon the representation of the United States Reclamation Service that it correctly expressed the amount of water appropriated by appellant. The Bill of Complaint was filed September 5th, 1919, pursuant to leave granted on petition of appellant herein, and by order of the Circuit Court of Appeals entered on the 3rd day of September, 1919. The Second Amended Complaint in condensed form is as follows:

Second Amended Complaint.

I.

Appellant is a corporation under the laws of Washington, carrying on irrigation, and recites the judgment of the District Court, affirmed by the Circuit Court of Appeals, and that no action has been taken thereon since the entry of said judgment.

II.

Appellant appropriated and has constantly used since 1890 4000 miner's inches of water taken from the Yakima River, in the County of Kittitas, Washington, measured at the users' distribution boxes, which it has used without interference up to the present date.

III.

That on October 21, 1905, appellant entered into an agreement in writing, at the solicitation of T. A. Noble, agent and representative of appellee, by which the water appropriated by it should be measured in cubic feet per second of flow, instead of miner's inches, which was expressed in said agreement as 80 cubic feet per second, which appellant was led to believe by the said T. A. Noble, who was a hydraulic engineer of skill and attainment, was the equivalent of the water it was appropriating, to-wit, 4000 miner's inches at the service boxes, and appellant limited to the use of the flow of water so measured in cubic feet per second, and in the summer of 1908 appellant discovered that a mistake had been made, and notified the said Noble and protested against being bound by said agreement, repudiating said agreement, which would deprive appellant of sufficient water to supply its stockholders, as the amount appropriated is necessary to produce the crops of the stockholders covering about seven thousand acres in grass, grains and other crops, all of which land was in a high state of cultivation, and although the said Noble was then in the employ of the State of Washington in irrigation work, appellant believed that he was with and employed by the United States Reclamation Service, and did not know the contrary until the trial in 1914.

IV.

That appellant discovered when the protest was made that four thousand miner's inches of water measured at the users' distribution boxes, would require a much larger amount than eighty cubic feet per second, which was not sufficient to protect and mature the crops.

V.

That appellant believed its rights had been fully protected by notifying the said Noble, by whom appellee would be duly informed of its protest, but upon the trial of the case the court held that the protest had not been communicated to appellee, but that appellant ratified the agreement by remaining silent, which conclusion caused the case to be determined adversely to appellant, which would not have occurred if the facts regarding the prompt disavowal and repudiation of the agreement had been presented, but they were unknown and could not be known at that time to appellant.

VI.

That upon the trial, Noble was questioned by the vice-president of appellant, on leaving the witness stand, at the suggestion of appellant's counsel, as to whether he did not notify the Reclamation Service about the protest and rights claimed in the summer of 1908, and thereupon Noble answered that he had no such recollection or words to that effect, and upon

communicating this to counsel for appellant the matter was not pressed further, as it was believed that Noble had not communicated the facts to the Reclamation Service.

VII.

That after the case was appealed to the Circuit Court of Appeals, appellant learned for the first time that immediately after the protest was lodged with Noble as aforesaid, he then and there communicated the fact to the officer of the United States in charge of all irrigation affairs in the entire Yakima Valley in the State of Washington, and informed him of the mistake and the intention of the appellant and its stockholders to refuse to stand and abide by the agreement because of mistake and misunderstanding, which discovery was made on or about June 18th, 1918, and said agent in chief was in court and on the stand as a witness, and did not disclose the fact of notice, and had he done so the decision would have been different.

VIII.

That appellant was taken by surprise when it was showed by the witness Noble that he was not an officer of the Reclamation Service at the time the protest was made to him, and that T. A. Noble will be produced as a witness on any new trial, and will testify that in 1905 and 1906 he was in the employ of the Reclamation Service on Yakima River projects, and

conferred with the officers and stockholders of appellant, and was a party to securing the "limiting agreement," whereby appellant was induced to limit the use of its water to 80 cubic feet per second of time; that he left the employment of the Reclamation Service Jan. 1st, 1907, and in 1908 was appointed State Water Commissioner for Kittitas and Yakima Counties, and closely associated with the Reclamation Service and in the discharge of his duties in July, 1908, went to the County of Kittitas for the purpose of regulating the flow of waters from the Yakima River in to the various canals, and while there discussed the "limiting agreement" with the officers of appellant, who stated that the company had been misled by their misunderstanding and by misrepresentation as to the effect of said agreement, and they had understood and been given to understand that the amount placed in the agreement was equal to 4000 inches of water according to the method used by appellant, and a mistake had been made, and appellant and its stockholders would not be bound by the "limiting agreement," and protested against their being so bound because of the mistake and the fact that they had been misled, and that they had used and would insist upon using the amount of 4000 inches as measured by them through the distribution boxes of the stockholders, and at that time Noble measured the water taken by appellant and

found that it exceeded 80 cubic feet per second, and immediately thereafter went to North Yakima to the Chief Officer of the Reclamation Service on the Yakima River projects, Charles H. Swigart, and related to him the interview had with the officers of the company, and that the company was taking in excess of 80 cubic feet per second, and had protested and stated to said Noble as aforesaid, and proposed to resist any attempt to reduce the amount of water to be taken by them to 80 cubic feet per second, and thereupon Swigart advised Noble not to proceed to enforce the agreement, but let the matter go as it was; that Noble was a witness on the trial, and was asked by Mitchell Stevens, an officer of appellant after he had left the stand, if he the said Noble did not convey the statement and protest made to him, but the said Noble remarked that he didn't remember about it; that long after the trial in the summer of 1918, the said Mitchell Stevens called on Noble, and after discussing what had occurred and been said, the said Noble finally was able to recall that the things hereinbefore stated had been done and said, and the reason the agreement was not enforced was because of the information conveyed to Swigart and his request not to proceed further.

IX.

That appellant has been in the open, notorious and continuous use of all the water ap-

propriated by it when needed, without let, hindrance or protest from any person or persons whomsoever, and by adverse user is entitled to have its rights adjudicated entitling it to the use in future as in the past of the entire 4000 miner's inches of water measured at the users' boxes, and it will be able to prove all its rights, and for which it claims a new trial, by T. A. Noble, J. H. Prater, F. A. Strandle, Mitchell Stevens, and John Burch, C. F. Kenneth, and W. A. Stevens, who will be in court as witnesses when said action is heard again in the District Court; that if the judgment is continued in force and effect appellant and its stockholders will be greatly and irreparably damaged.

X.

That because of suppression of the fact by appellee of having had notice of said protest and reservation of rights, a manifest fraud and injustice was visited upon appellant, and three years have not elapsed since the discovery of the fraud, and of the proof to right the wrong suffered; that upon discovering the new evidence hereinbefore stated appellant did not immediately file its bill of review, but because of change in the officers in charge of the Reclamation Srvice, and believing that its application for redress was being favorably considered, and plans and methods were discussed orally and by correspondence to the end that

an adjustment might be made obviating further litigation, and such negotiations resulted in petitions being presented to the federal departments and arguments being made thereon; that all said matters were pending at the time action was taken in the United States Circuit Court of Appeals for an order allowing appellant to file its bill in this cause, and such action was taken because appellant feared the loss of its rights by delays in the negotiations, and the reason action was not taken sooner was because appellant and its officers were led to believe that on account of the injury done by suppressing the new evidence it would be relieved from the wrong it had sustained by the decree without applying to this Court for redress, and the matter settled without further litigation.

XI.

That appellee is a user and seller of water taken from the Yakima River not in its sovereign capacity, but in a private capacity, in a business way, the same as individuals or private corporations of the State of Washington, and has no rights other than those enjoyed under the laws of the State of Washington, the said Yakima River being purely an intrastate stream.

XII.

That by reason of the discovery of said new matter, the judgment ought to be reviewed and reversed, and appellant granted a decree affirm-

ing its right to all of the water by it originally appropriated and by it used since the time of appropriation, and all of which is required for conducting its affairs.

XIII.

That appellant has been put to large expense in defending its rights, because of the wrong and fraud suffered, and appellee should be required to pay the same and all thereof to appellant.

XIV.

That appellee has never attempted to enforce said decree.

PRAYER for review of said action and a decree in conformity with the newly discovered evidence, that said judgment be reversed and set aside, that the action be heard on such new and supplementary matters as may be offered, at the same time it is reheard upon said original complaint, that appellant have leave to amend its answer in the original cause, to comport with the facts hereinbefore set forth, and be awarded a decree settling its rights to the water appropriated and used as set forth in the complaint, without interference on the part of appellee, that it may recover its costs, and for such other relief as may be equitable. (Record, pp. 14-28.)

On April 10th, 1920, appellee filed its Motion to Dismiss the Second Amended Bill of Complaint, which was briefly as follows:

Motion to Dismiss Second Amended Bill of Complaint.

Motion to dismiss the second amended complaint, and deny all application for relief thereunder, on the following grounds:

1. Insufficient facts to require an answer.
2. Want of equity.
3. That the court will take judicial notice of the record in the case in which the judgment was entered, which is sought to be vacated, and by reference thereto, it appears that appellant seeks relief upon grounds different and variant from those asserted in the original case.
4. The record in the former trial shows that Charles H. Swigart was never a witness in that case, in which respect the representations made are not true.
5. That the allegations of fraud are inadequately pleaded, and appellant made no effort on the former trial to support any allegation that the company had given notice to the Reclamation Service of renunciation of the contract.
6. That the alleged newly discovered evidence is cumulative, immaterial and not controlling, and there is ample to sustain the decree on other grounds, and if the facts alleged to show notice of renunciation of the agree-

ment had in fact been communicated to the United States as stated, the notice was casual, incidental, informal and hearsay only, and not sufficient to form basis for abrogation of contract.

7. That the abrogation of contract came too late because it appears from evidence on former trial that the United States had prior thereto expended vast sums in reliance on the contract, and Government could not be placed in position it was before the contract was signed, and would be entitled to disregard said notice.

8. Stipulation in former action shows that prior to alleged notice of renunciation the Secretary of the Interior had approved the Yakima Project, and expended large sums in reliance of appellant's contract and those of others of similar tenor.

9. That record on former trial shows that appellant had knowledge that the contract limited its use to an amount of water less than it claims as early as January, 1906, and it is guilty of laches in failing to notify the United States until the summer of 1908, at which time the Government had already expended $1,263,-000.00.

10. That appellant is further guilty of laches in bringing this action, as it became acquainted with the facts set forth in the second amended bill of complaint as early as June,

1918, and the facts set forth as justification for the delay are not sufficient to relieve from imputation of laches.

11. That said application is an abuse of the administration of justice, in the hope of protracting litigation.

(Record pp. 28-33.)

On April 12th, 1920, the District Court rendered its order and judgment dismissing the second amended bill of complaint, and that the action be dismissed, to which ruling and judgment of the Court, appellant excepted and an exception was duly allowed. (Record. p. 34.)

SPECIFICATION OF ERRORS.

The District Court erred and its judgment was erroneous in the following particulars:

I.

The Court erred in holding that the second amended complaint herein does not state facts sufficient to constitute a cause of action, nor facts sufficient to entitle appellant to the relief sought, and in granting the motion to dismiss the same.

II.

The Court erred in dismissing the second amended complaint upon the ground of laches and want of equity.

III.

The Court erred in rendering and entering its decree dismissing this action and giving judgment against this appellant.

ARGUMENT.

The decree of the Circuit Court of Appeals affirming the judgment sought to be vacated, was rendered October 15th, 1917. By reference to the Second Amended Complaint, it will be seen that it was the summer of 1918 before appellant discovered that the so-called "limiting agreement" had been promptly disavowed as soon as it became known that it did not express the facts. At that time, Mitchell Stevens, the Vice-President of the company, called upon Mr. T. A. Noble, and the details were discussed, whereupon Mr. Noble did remember that immediately after the protest made to him in 1908, he had gone to Charles H. Swigart, Chief Officer of the Reclamation Service on the Yakima River projects, and related to him the interview had with the officers of the company, that the company was using in excess of 80 cubic feet of water, and would resist any efforts to restrict them to less than their appropriation, for the reason that the agreement did not correctly state the facts, and they were misled by the Reclamation Service as to the measure of water which would supply them with the quantity they were entitled to. It will be remembered that on the trial in the District Court, Mr. Noble went on the witness stand, and as he left the stand was interrogated at suggestion of counsel for appellant, and could not then recall that he had communicated these facts to the Reclamation Service, and therefore it seemed useless to plead the disavowal of the contract, and from the evidence as then pre-

sented it seemed true that appellant had never protested against the agreement to the Government itself. As Mr. Noble was the water commissioner at the time the protest was made to him, the officers of the company took it for granted that he was the proper official to notify of their position. One of the grounds upon which the Circuit Court of Appeals relied in arriving at its judgment, was the failure to communicate this protest to the Government, whereby it was held that appellant had ratified the agreement.

The discovery of this new and important evidence places the whole matter in a different light. Instead of a binding agreement, which the courts held was not subject to the construction placed upon it by appellant, the company is now in position to prove that there was never any agreement at all, for the reason that the so-called agreement was promptly disavowed as soon as appellant knew what it meant. Appellant at no time thought or understood that it was in any way parting with any of its property.

There is no question but that the Government was responsible for the statement of 80 cubic feet per second as the amount limited to appellant in the agreement, and that the federal officers or agents responsible therefor knew it was intended to represent the amount of water measured at the users' boxes as 4000 miner's inches, and that appellant's officers relied upon the superior technical knowledge and good faith of the federal agents, when

they assured appellant's officers that they would get that amount of water if the agreement read 80 cubic feet per second. It is likewise certain that such representations were false, and the correct equivalent would have been about 105 cubic feet per second. These facts appellant has alleged in its second amended complaint, and is prepared to substantiate by proper evidence.

Not only does the second amended bill of complaint seek relief because of fraudulent misrepresentations in obtaining the signature of appellant to the "limiting agreement," but by the newly discovered evidence it conclusively appears that there was no agreement in existence upon which to base the court's decree, because as soon as the truth had been discovered appellant promptly disavowed the agreement, stating to the Reclamation Service through Mr. Noble that the contract was void because unauthorized and secured through misunderstanding of measurements therein stated, and this protest and disavowal was immediately communicated to the United States Reclamation Service, and the chief officer in charge thereof, to whom the communication was made, concluded to leave appellant in the enjoyment of its rights, and not to molest it.

Another feature of the trial of the case, which does not add anything to the equity and good conscience of appellee, to say the least, was not only its silence as to receiving notice of protest, but when it became apparent that appellant could not prove

any actual notice, counsel for the Government made the utmost of such failure of evidence, and emphasized to the highest degree, noting specifically in five different places in their brief, such failure, and thus it became the most cogent reason of the Circuit Court of Appeals for affirming the judgment, that appellant had ratified the contract by its silence.

We do not claim any intentional bad faith on the part of appellee, but we do state that it has obtained a judgment taking appellant's property without its consent, and without compensation, and that it is not in position to avail itself of that purely technical advantage on the ground of estoppel, which is the only theory upon which such judgment can be sustained.

The misrepresentations referred to above and reasons given, were all communicated to the federal Reclamation officer, as shown by the newly discovered evidence, as alleged in the second amended complaint, and yet the District Court has dismissed the case on motion, because it says, the newly discovered evidence was immaterial, since it was determined on the previous trial that there was no mistake anyway. We believe, in view of this evidence, that we are entitled to prove that there was a mistake, and false representations as well, and that the appellant disavowed the contract because thereof, and the Government accepted the same as a renunciation and abrogation of the agreement.

In rejecting the newly discovered evidence, on the ground that the original decree found that there

was no mistake, the court was in error, inasmuch as the only mistake considered in that case was the question of mistaken construction of the agreement, while the mistake pointed out here is a mistake of fact—that appellant was induced to sign an agreement supposed to state correctly the amount of water it was appropriating, while it actually limited appellant to a quantity much less than that. The Opinion of the District Court itself disposes of its own conclusion in that respect, in the following language:

> "Indeed, in the view of the Trial Court and the Appellate Court the issue now sought to be raised was not presented by the pleadings in the original case, and the defendant is merely seeking a trial *de novo* on an entirely new theory."

But that is no reason why the bill of complaint is insufficient. The authorities do not sustain the decision on that point.

The new matter may be concerning a point not in issue in the original cause, provided that it be connected with the subject-matter of the bill.

Foster's Federal Practice (3rd Ed.) Sec. 355, Vol 1, pp. 789-90.

Partridge vs. Osborne, 6 Russ. 195.

United States vs. Sampeyreac, Hempst. 118.

Matter discovered after the decree has been made, though not capable of being used as evidence of anything which was previously in issue in the cause, but constitutes an entirely new issue, may be the

subject of a bill of review.

Fletcher's Equity Pl. & Pr., Sec. 922, pp. 981-2.

Story Eq. Pl. Sec. 416.

Dan. Ch. Pl. 1577.

The newly discovered evidence is, therefore, entirely relevant and material, and sufficient to sustain the bill in this case, as it shows that appellant promptly disavowed the so-called "limiting agreement," upon discovering that it had signed an instrument which did not express the true intention and agreement between the parties, and was therefore no contract at all.

There is no contract where a party takes advantage of mistake, by accepting an offer which does not express the real intention of the other party.

Page on Contracts, Vol. 1, Sec. 86, pp. 144-145.

It has been generally held, that where the seller either over or under estimates the quantity of the subject-matter of the sale, and he is in position to know the quantity, or from a reasonably accurate estimate thereof, and the purchaser is not, if the seller falsely and fraudulently over or under estimates the same, and such estimate is relied upon by the purchaser, it constitutes a fraud.

Cases cited in Note, 45 L. R. A. (NS) p. 243.

Misrepresentation of material facts, although innocently made, if acted upon by the other party to his detriment, will constitute sufficient ground for

rescission and cancellation in equity.

9 C. J. 1169.

Mistake of fact by one party to contract constitutes ground for rescission.

9 C. J. 1167-8.

The only fraud necessary to sustain the judgment is such as may be inferred from failure of defendant to correct the mistake of plaintiff, known to or suspected by the former.

Wilson vs. Moriarty, 88 Cal. 207, 212; 26 Pac. 85.

Mistake of fact sufficient to avoid contract, even though neither party guilty of fraud, and this even though the apparent obligations of the parties have been fully performed.

9 C. J. 1166-7.

A mistake similar to that complained of here is also good ground for a bill of review. A mistake in the figuring because of data accidentally overlooked is ground for a bill of review.

34 Cyc. 1707.

Now, it plainly appears from the Second Amended Complaint, that appellant had appropriated and was in the actual use of 4,000 miner's inches of water, measured at the users' distribution boxes, at the time the "limiting agreement" was signed, and that by the newly discovered evidence of T. A. Noble, it will be able to prove not only that appellant's protest and refusal to comply with the agreement was duly communicated to the Reclamation Service immediately upon discovery of the mistake, but also the

nature of the mistake, namely, that 80 cubic feet per second at the intake was not equivalent to 4,000 miner's inches as measured by appellant, or, no matter how it was measured, that it was not a correct estimate of the flow of water appellant had appropriated and was using, and which it was intended to represent. Appellant will be able to prove that there had been no possible increase in the diversion of water to its canal during the three years from the time of signing the agreement to the date of protest, which was the quantity appropriated, and intended to be defined by the agreement, in other words, conclusive proof that the agreement was based on a mistaken estimate. That was not the question in issue on the former trial, although it is vital to the decision. The question there raised was, whether 80 cubic feet per second fixed in the agreement, was intended to represent a measurement taken at the intake or at distribution point—a question of construction of contract. We can not deny that the court determined that question, and held that the contract must be construed to mean 80 cubic feet at the intake. No matter how erroneous appellant may consider that conclusion to be, it seems that we are precluded from going behind that finding of the court on the former trial. But the mistake of fact on which appellant's protest was based was not in issue in that case, was not set up in the pleadings, and was not decided in the sense that it is not now open to review upon the newly discovered evidence. Nevertheless, it is so connected with

the subject-matter of that case, that it is vital to the decision, and the decree can not stand, unless it is determined adversely to appellant. Appellant went right on using the same amount of water it had always diverted from the time of signing the agreement down to the date of protest, and in so doing believed that it was in all things complying with the agreement itself, and when it was notified by Mr. Noble that he was going to enforce the agreement by cutting down their flow of water very materially, appellant and its trustees protested promptly and emphatically. The doctrine of estoppel can not be asserted against appellant under those circumstances. We earnestly contend that appellant should not be denied a new trial on these important questions, because of the decision arrived at under the original pleadings, and certainly its bill of review should not have been dismissed without at least a full hearing on the merits. It is a question of great importance, affecting many property owners, and valuable rights. The Reclamation Service has not by any means cleared itself of the imputation of unfairness in this transaction, and it would be inequitable to deny these people every opportunity to maintain their rights which equity will allow. And be it remembered that appellee is not here acting in its sovereign capacity but as a user of water like any citizen of the state and could not have acted at all in using water but for the permission granted by the legislature of the state of Washington. See Sec. 6411 R. & B. Code of Washington.

Another point: The District Court dismissed the question of ultra vires, with the remark that the newly discovered evidence had not changed the situation in that regard. We think it has materially. The court in the former trial held that the contract was not ambiguous, and must be upheld, because the officers of appellant, signed it, notwithstanding it takes property of the stockholders which they never authorized, because they are estopped by acquiescence and failure to renounce the unauthorized act. It was not necessary to state in so many words, that the officers were not authorized to sign the agreement, even if the court held that they must be regarded in law as having intended to do what they actually did, that is, agreed to in writing. There was never any pretense that the stockholders gave the officers of appellant discretionary power. This legal inference can not be extended to the stockholders, who never authorized it, and protested as soon as they knew what the officers had signed, or what the Government claimed it was, no matter in what words that protest was expressed. They can not be estopped on the ground of acquiescence, even though they did not state in their protest want of authority. It is sufficient that they protested, and have continued to protest all the time, and have lived up to their protest by refusing to comply with the agreement. Having protested against the agreement itself, they can not be held to have ratified the act of their officers in signing it, solely upon the ground that they did not specifically disclaim their

authority to do so. Ratification assumes that the agent had no authority, but the principal becomes bound by adopting the unauthorized contract itself. The newly discovered evidence shows that this was not done in the case at bar.

Ratification, in the law of principal and agent, is the adoption and confirmation by one of an act or contract performed or entered into in his behalf by another, who, at the time, assumed to act as his agent without authority to do so.

Lexington v. Lafayette County Bank, 165 Mo. 671; 65 S. W. 943.

Reid v. Field, 83 Va. 26.

Ft. Scott Nat. Bank v. Drake, 29 Kan. 311, at 323.

Ansonia v. Cooper, 64 Conn. 536, at 544.

Heyn v. O'Hagen, 60 Mich. 150, at 156; 26 N. W. 861.

II.

There can be no valid reason, as it seems to counsel for appellant, whereby the judgment may be sustained on the ground of laches. The allegations of the second amended complaint completely negative that conclusion. It does not appear that delay in bringing suit has prejudiced appellee in any way.

The defense of laches to defeat the right to rescind a contract for fraud will not be entertained unless it is made to appear that it would be inequitable to deny it.

Davis v. Louisville Trust Co., 181 Fed. 10; 104 C. C. A. 24; 30 L. R. A. (N. S.) 1011.

It is alleged that immediately after discovery of the new evidence, there was a change in the officers of the Reclamation Service, and the facts were laid before the new officials that appellant was led to believe its application was being favorably considered, plans and methods were discussed, which led to filing petitions with federal departments, and arguments made thereon, which matters were pending when appellant applied for leave to file its bill of review, which was finally done because of the delay in the negotiations with the Government; that action was not taken sooner because appellant had reasonable grounds to believe that matters would be adjusted without further litigation.

There is no arbitrary bar by lapse of time to filing a bill of review based on new matter.

16 Cyc. 522, and cases cited.

On the question of laches and bearing directly thereon the doctrine is set forth in our favor as found in

9 C. J. 1203 (Sec. 4).

13 C. J. 601 (§ 623).

The question of diligence was disposed of by granting leave to file the bill of review, both by the Circuit Court of Appeals and the District Court. There was nothing before the court on the motion to dismiss, which was not before it then. That order is a judicial determination, not to be set aside without cause.

In the case of a bill of review based on newly discovered evidence, the question of diligence is neces-

sarily a preliminary one upon which it is not necessary to join issue by the pleadings, but which is to be considered and passed upon at the time application is made for leave to file the bill, and having been once disposed of when the bill is allowed, it will not again be considered on the final hearing.

Kelley Bros. and Spielman v. Diamond Drill & Machine Co., 142 Fed. 868, affirmed, *Birdsboro Steel Foundry & Machine Co. v. Kelley Bros & Spielman*, 147 Fed. 713; 78 C. C. A. 101.

Lewellen v. Mackworth, 2 Ark. 40.

Hodges v. Mullikin, 1 Bland. Ch. 503.

Crawford v. Smith, 93 Va. 628; 25 S. E. 235, 657.

It has been said that the question of diligence is preliminary, and having been disposed of by permission to file the bill it will not again be considered on the final hearing, if not improvidently granted.

Foster's Federal Practice, Vol. 2, 1409.

There is absolutely nothing from which laches may be inferred on the part of appellant, and it seems a manifest abuse of discretion of the court in dismissing the bill on that ground. If anyone has slept on his rights, it is appellee. The judgment sought to be set aside remains unenforced, and no attempt has ever been made to carry it into execution. That corroborates the allegations concerning pendency of negotiations commenced upon discovery of the new evidence. Appellee certainly has not suffered because of the delay.

Several paragraphs of the motion are directed to the point that appellant's attempted renunciation of contract came too late, after the Government had expended large sums in developing the project. There is no showing on that account, which amounts to an estoppel. In the first place, procuring the "limiting agreement" in this instance was not one of the prerequisite conditions required by the Department of the Interior before undertaking the reclamation project. It was neither the adjustment of a conflicting claim, nor determination of a suit pending. Far from being a conflicting claim, it is undisputed that the agreement was intended to preserve all rights claimed by appellant, and relinquishing none.

In the second place, no matter how much money the Government has expended in developing the project, there is not the slightest ground for inference that it would not have been done, if the agreement had not been obtained from appellant, or that appellee relied thereon to its detriment. Anyway considering the large amount appropriated by respondent the water here in question is so small as to make the Reclamation Service's claim for damage ridiculous.

Thirdly, it does not appear that anyone was injured by the delay, although that would not be a defense in this action in any event.

And in this connection, may we not ask, who will be injured if the bill of review should finally prevail? What injury can result from depriving one

of something he never had? On the other hand, if appellant is denied a hearing, it will be forcibly dispossessed of property it has enjoyed continuously for over twenty years, and the seven thousand acres of cultivated farm lands of its numerous stockholders will be immediately stripped of more than a quarter of their value, their crops will be sacrificed, and many of them ruined. And yet it is proposed, that appellant be denied even a hearing on its bill of review, because it was guilty of laches in attempting to adjust its rights out of court, and during all that time appellee could have enforced the judgment it had obtained at any moment, but has never made any attempt to do so.

Finally, we call attention to the failure of the case in 56 Wash. cited in the opinion of the court, to sustain the rule there laid down. It was an application to modify a judgment for mere variance between the complaint and judgment. The Washington statute, which the District Court refers to, cited in 56 Wash., and found in Secs. 466 and 467 Rem. Code of Washington, is inapplicable to an application to review a judgment on the ground of newly discovered evidence, and affords no basis for the Court's decision, even by analogy.

III.

To recapitulate: The newly discovered evidence will show that when notified that the "limiting agreement" would be enforced by curtailing appellant's right to divert the quantity of water it was using, its officers immediately protested on behalf

of the stockholders, and refused to comply with the agreement, because they were never authorized and never intended to sign an agreement, which would surrender any right which they claimed, and it will be proved, first, that when the agreement was signed they were entitled to the full amount of water in use at the time of protest, and since that time, to-wit, the total flow of water then and now required to irrigate the lands under appellant's canals, which the evidence will prove conclusively has been a constant quantity at all times from a date prior to the signing of said agreement, and second, that the only agreement between the parties was one limiting appellant to that amount of water, and when the agent of the Reclamation Service called upon the stockholders to give a definite estimate of amount they claimed and were appropriating, that was very clearly given as 4,000 miner's inches, measured at the users' distribution boxes, as determined by the custom and decision of the Superior Court of Kittitas County, and when it was defined in the agreement by the Reclamation Service as 80 cubic feet per second, which was not equivalent to the amount agreed upon, that act was unauthorized, and the discrepancy was unknown to appellant or its stockholders until the protest was made in the summer of 1908, and appellant has at all times maintained the right to divert the original amount of water notwithstanding the so-called "limiting agreement;" that appellant was misled on the former trial by Mr. Noble's inability to recall the notice of disavowal

promptly communicated to the Reclamation Service at the time it was made, and thereby appellant was unable to present the evidence on the trial, and the only result attained with a construction of the agreement favorable to the Government; that from that moment down to the filing of the Bill of Review, appellant has been unremitting in its endeavors to obtain relief from the judgment entered, by negotiations with the Reclamation Service, petitions to the Department of the Interior, and Executive Officers of the United States, and was led to believe by the federal authorities that matters could be satisfactorily adjusted without litigation; that appellant has been guilty of no laches, has done nothing which amounts to an estoppel of its rights, and there is no want of equity in its bill; while appellee, on the other hand secured appellant's signature, in the first place, to a document contrary to its clearly expressed intention and understanding at the time, confirmed that understanding by acquiescing therein for years, and when it finally did undertake to enforce the agreement, took an unconscionable advantage of appellant's inability to prove its disavowal of the agreement at the time, and obtained a judgment against appellant upholding the contract as ratified by failure to repudiate it, and has finally lulled appellant by a hope of amicable adjustment out of court, which has resulted in a delay, which the District Court has made the ground upon which it has dismissed the bill of complaint in this proceeding, and rendered the judgment appealed from.

It is respectfully submitted, that the judgment of the District Court should be reversed, and that the cause may proceed to hearing upon the second amended bill of complaint.

Respectfully submitted,

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